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No. 87-133

In the Supreme Court of the United States

OCTOBER TERM, 1987

MERCILYN BUCHANAN, ET AL., PETITIONERS

v.

STANSHIPS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Rule 4(a)(4) of the Federal Rules of Appellate Procedure provides that if any party files a timely postjudgment motion to alter or amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure, a notice of appeal filed prior to disposition of the motion "shall have no effect." The question presented is whether a postjudgment application for costs by the prevailing party in the district court constitutes a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e) and therefore renders a prior notice of appeal invalid under Fed. R. App. P. 4(a)(4).

TABLE OF CONTENTS

	Page
Statement	1
Discussion	3
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Acosta v. *Louisiana Dep't of Health & Human Resources*, No. 85-1500 (June 30, 1986)	5, 11
Alimenta (U.S.A.), Inc. v. *Anheuser-Busch Cos.*, 803 F.2d 1160 (11th Cir. 1986)	6
Beckwith Machinery Co. v. *Travelers Indemnity Co.*, 815 F.2d 286 (3d Cir. 1987)	5
Budinich v. *Becton-Dickinson & Co.*, cert. granted, No. 87-283 (Oct. 13, 1987)	6
Citizens Coalition for Block Grant Compliance, Inc. v. *City of Euclid*, 717 F.2d 964 (6th Cir. 1983)	8
Charles v. *Daley*, 799 F.2d 343 (7th Cir. 1986)	12, 13
Cohen v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)	9
Delta Air Lines, Inc. v. *August*, 450 U.S. 346 (1981)	8
Durham v. *Kelly*, 810 F.2d 1500 (9th Cir. 1987)	7
Eisen v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974)	9
Farmer v. *Arabian Am. Oil Co.*, 379 U.S. 227 (1964)	8
FCC v. *League of Women Voters*, 468 U.S. 364 (1984)	9
F.H. Krear & Co. v. *Nineteen Named Trustees*, 776 F.2d 1563 (2d Cir. 1985)	6
Gorden v. *Heimann*, 715 F.2d 531 (11th Cir. 1983)	5
Harcon Barge Co. v. *D & G Boat Rentals, Inc.*, 784 F.2d 665 (5th Cir. 1986), cert. denied, No. 85-2015 (Nov. 3, 1986)	3, 10, 11
Harris v. *McCarthy*, 790 F.2d 753 (9th Cir. 1986)	8
International Ass'n of Bridge & Ironworkers' Local Union 75 v. *Madison Indus.*, 733 F.2d 656 (9th Cir. 1984)	6
Knighton v. *Watkins*, 616 F.2d 795 (5th Cir. 1980)	5, 8
Lucas v. *Florida Power & Light Co.*, 729 F.2d 1300 (11th Cir. 1984)	6, 10
Metcalf v. *Borba*, 681 F.2d 1183 (9th Cir. 1982)	5

Cases—Continued: Page

Morey v. *Barrington Press, Inc.*, cert. denied, No. 87-32 (Oct. 13, 1987) 6
Public Law Enforcement Inst. v. *United States Dep't of Justice*, 744 F.2d 181 (D.C. Cir. 1984) 8
Skagerberg v. *Oklahoma*, 797 F.2d 881 (10th Cir. 1986) .. 13
Smillie v. *Park Chemical Co.*, 710 F. 2d 271 (6th Cir. 1983) 5
Spray-Rite Serv. Co. v. *Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982), aff'd, 465 U.S. 752 (1984) 5
White v. *New Hampshire Dep't of Employment Sec.*, 455 U.S. 445 (1982) 3-4, 7, 8

Statutes and rules:

Death on the High Seas Act, 46 U.S.C. (& Supp. III) 761 *et seq.* 1
42 U.S.C. 1988 ..... 4, 7, 8
Fed. R. App. P.:
Rule 3 1
Rule 4(a)(4) 2, 3, 5, 6, 7
Fed. R. Civ. P.:
Rule 1 11
Rule 52(b) 2, 3
Rule 54(d) 2, 7, 8, 10, 11
Rule 58 10
Rule 59(e) 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13
Rule 60(a) 11
Sup. Ct. R. 11.3 9

Miscellaneous:

Comment, *Taxation of Costs in Federal Court—A Proposal*, 25 Am. U. L. Rev. 877 (1976) 10
10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil* (2d ed. 1983) 10

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. This case arises out of a claim brought by petitioners in the United States District Court for the Middle District of Louisiana under the Death on the High Seas Act, 46 U.S.C. (& Supp. III) 761 *et seq.* Following a bench trial, the district court ruled for respondents on January 20, 1987. On January 26, 1987, the district court formally entered a judgment dismissing petitioners' suit with prejudice (Pet. App. 15). The judgment contained no reference to costs.

On January 27, 1987, the day after the entry of judgment, petitioners filed a notice of appeal in the district court pursuant to Rule 3 of the Federal Rules of Appellate Procedure (Pet. App. 16). Two days later, on January 29, respondents filed an application for the allowance of

costs (*id.* at 17). The Federal Rules of Civil Procedure contemplate that the prevailing party will present the clerk of the district court with a bill of costs, which the clerk allows unless the losing party files a motion contesting his liability for costs within five days. See Fed. R. Civ. P. 54(d). Rather than follow this procedure, however, respondents presented the district court here with what they styled a "Motion to Alter or Amend Judgment." The motion asked the district court to amend its judgment of January 26 "to reflect that [respondents] are entitled to recover their taxable costs against [petitioners]." The motion asserted that it was filed "pursuant to the provisions of Rule 52 and Rule 59 of the Federal Rules of Civil Procedure." Pet. App. 17.

The district court issued an order granting respondents' motion on January 30, 1987, three days after petitioners had filed their notice of appeal (Pet. App. 18). Petitioners did not file a second notice of appeal following the district court's disposition of the costs motion. Respondents subsequently filed a motion in the Fifth Circuit seeking dismissal of petitioners' appeal for lack of subject matter jurisdiction (*id.* at 19). Respondents relied on Rule 4(a)(4) of the Federal Rules of Appellate Procedure, which provides in relevant part that if a postjudgment motion to alter or amend the judgment under Fed. R. Civ. P. 59(e) is filed in timely fashion in the district court, the time for appeal shall run from the date of the district court's order disposing of the motion and "[a] notice of appeal filed before the disposition [of the motion] shall have no effect." Respondents contended that their postjudgment motion for the allowance of costs was a Fed. R. Civ. P. 59(e) motion and that, in consequence, petitioners' notice of appeal—which had been filed before the disposition of the motion—was jurisdictionally invalid under Fed. R. App. P. 4(a)(4).[1]

[1] Respondents also asserted that their postjudgment motion had been a Fed. R. Civ. P. 52(b) motion for additional findings of fact.

2. The Fifth Circuit granted respondents' motion and dismissed the appeal (Pet. App. 25-27). The Fifth Circuit based its ruling on its prior decision in *Harcon Barge Co.* v. *D & G Boat Rentals, Inc.*, 784 F.2d 665 (1986) (en banc), cert. denied, No. 85-2015 (Nov. 3, 1986). In *Harcon Barge*, the Fifth Circuit held (784 F.2d at 667) that:

> [A]ny post-judgment motion to alter or amend the judgment served within ten days after the entry of the judgment, other than a motion to correct purely clerical errors covered by Rule 60(a), is within the unrestricted scope of Rule 59(e) and must, however designated by the movant, be considered as a Rule 59(e) motion for purposes of Fed.R.App.P. 4(a)(4).

The Fifth Circuit concluded in the present case, as it had in *Harcon Barge* itself, that a postjudgment motion respecting costs comes within "the unrestricted scope of Rule 59(e)" when filed within 10 days of the entry of judgment (Pet. App. 26-27). Following this approach, the Fifth Circuit concluded that petitioners' notice of appeal, filed prior to the district court's disposition of respondents' motion for costs, is invalid under Fed. R. App. P. 4(a)(4) and therefore does not vest the court of appeals with jurisdiction over the appeal (Pet. App. 26-27.).

DISCUSSION

The Fifth Circuit's decision in this case, which holds that a postjudgment motion for costs filed within 10 days after entry of judgment constitutes a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e), is inconsistent both with this Court's decision in *White* v. *New*

Under Fed. R. App. P. 4(a)(4), a Fed. R. Civ. P. 52(b) motion has the same jurisdictional consequences as a Fed. R. Civ. P. 59(e) motion. Respondents' postjudgment motion itself, however, made no request for additional findings. See Pet. App. 17.

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Hampshire Dep't of Employment Sec., 455 U.S. 445 (1982), and with the treatment accorded costs by the Federal Rules of Civil Procedure. The Fifth Circuit's decision directly conflicts with recent decisions of the Ninth and Eleventh Circuits as well. While the underlying jurisdictional issue in this case may not be significant enough to demand plenary consideration by this Court, the Fifth Circuit's decision is sufficiently at odds with this Court's holding in *White* and with the policies of the Federal Rules that summary reversal may be warranted.

1. In *White*, this Court unanimously held that a postjudgment application for attorneys' fees under 42 U.S.C. 1988 does not constitute a Fed. R. Civ. P. 59(e) motion to alter or amend the judgment. See 455 U.S. at 450-455. The Court began its analysis in *White* by invoking the prevailing view of the courts of appeals, "[c]onsistent[] with th[e] original understanding" of Fed. R. Civ. P. 59(e), that Rule 59(e) "support[s] [only] reconsideration of matters properly encompassed in a decision on the merits" (455 U.S. at 451). In contrast, the Court noted, "a request for attorney's fees under § 1988 raises legal issues collateral to the main cause of action—issues to which Rule 59(e) was never intended to apply" (*ibid.* (footnote omitted)). Because attorney's fees are available under Section 1988 only to "prevailing parties," Section 1988 fee applications "will therefore require an inquiry separate from the decision on the merits" which "cannot even commence until one party has 'prevailed' " (455 U.S. at 451-452). Moreover, attorneys' fees under Section 1988 "are not compensation for the injury giving rise to an action" and therefore cannot be characterized as another "element of 'relief' " (455 U.S. at 452). The Court therefore concluded that " 'unlike a motion to alter or amend a judgment[,]' " an application for attorney's fees " 'does not imply a change in the judgment, but merely seeks what is due *because of* the judgment' " (*ibid.* (emphasis added),

quoting *Knighton* v. *Watkins*, 616 F.2d 795, 797 (5th Cir. 1980)).[2]

In cases like *White*, where the prevailing party's entitlement to attorneys' fees is governed by a separate fees statute rather than by the provision creating the cause of action, the courts of appeals uniformly have held that *White* precludes treating postjudgment attorneys' fee motions as Fed. R. Civ. P. 59(e) motions. See, *e.g.*, *Gordon* v. *Heimann*, 715 F.2d 531, 536-539 (11th Cir. 1983); *Spray-Rite Serv. Co.* v. *Monsanto Co.*, 684 F.2d 1226, 1247-1248 (7th Cir. 1982), aff'd on other grounds, 465 U.S. 752 (1984); *Metcalf* v. *Borba*, 681 F.2d 1183, 1184-1185 (9th Cir. 1982). As a result, the filing of such motions does not affect the timeliness of notices of appeal under Fed. R. App. P. 4(a)(4). See, *e.g.*, *Smillie* v. *Park Chemical Co.*, 710 F.2d 271, 273-274 (6th Cir. 1983).[3]

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[2] In *Acosta* v. *Louisiana Dep't of Health & Human Resources*, No. 85-1500 (June 30, 1986), the Court summarily affirmed a Fifth Circuit decision that treated a motion seeking reconsideration of an award of attorneys' fees as a Fed. R. Civ. P. 59(e) motion. The issue before this Court in *Acosta*, however, did not involve an original application for attorneys' fees; it involved a motion for reconsideration of a previous order awarding fees. In any event, the Court did not address the question whether a postjudgment motion relating to attorneys' fees may be made under Rule 59(e); instead, the Court simply assumed that a valid Rule 59(e) motion had been made and then addressed the question whether a notice of appeal filed after a district court's announcement of its ruling on a Rule 59(e) motion, but before entry of judgment on that ruling, is valid under Fed. R. App. P. 4(a)(4). *Acosta* therefore does not appear to signal a retreat from *White's* holding that attorneys' fee motions are collateral to the merits.

[3] In cases where attorneys' fees are sought as part of the relief provided by the underlying cause of action, rather than under a separate statute or rule, the courts of appeals have divided over the applicability of *White*. Compare, *e.g.*, *Beckwith Machinery Co.* v. *Travelers Indemnity Co.*, 815 F.2d 286, 288 (3d Cir. 1987) (*White's* reasoning does not apply in cases where the fee "award arises as an integral part of the merits of the dispute," such as where the contract underlying a breach-of-contract claim provides for fees as an element of damages), and

Two courts of appeals, the Ninth and Eleventh Circuits, have found *White*'s reasoning to be controlling in cases involving postjudgment motions that seeks costs rather than attorneys' fees. In *Lucas* v. *Florida Power & Light Co.*, 729 F.2d 1300 (1984), the Eleventh Circuit expressly held that an otherwise timely notice of appeal is not rendered void under Fed. R. App. P. 4(a)(4) by the filing of a postjudgment motion regarding the awarding of costs. Following this Court's reasoning in *White*, the Eleventh Circuit concluded that Fed. R. Civ. P. 59(e) motions involve "matters encompassed in a decision on the merits of the dispute, * * * not matters collateral to the merits" (729 F.2d at 1301). The court of appeals reasoned that a motion for costs does not constitute a Rule 59(e) motion under this standard because it "relates exclusively to the collateral question of what is due because of the judgment" (729 F.2d at 1301 (citing *White*)). The court of appeals noted that although "[t]he narrow issue" in *White* involved attorneys' fees, *White*'s reasoning "applies with equal if not greater force to costs, for costs must certainly be regarded as collateral to the main cause of action in this case" (*id.* at 1301 n.1). The Eleventh Circuit subsequently reaffirmed *Lucas* in *Alimenta (U.S.A), Inc.* v. *Anheuser-Busch Cos.*, 803 F.2d 1160 (1986).

F.H. Krear & Co. v. *Nineteen Named Trustees*, 776 F.2d 1563 (2d Cir. 1985) (same), with *International Ass'n of Bridge & Ironworkers' Local Union 75* v. *Madison Indus.*, 733 F.2d 656 (9th Cir. 1984) (all attorneys' fee requests, including those predicated on a contract underlying the suit, "[are] collateral to [the] main action" under *White*). See generally *Morey* v. *Barrington Press, Inc.*, No. 87-32 (Oct. 13, 1987) (Brennan & White, JJ., dissenting from denial of certiorari) (reviewing cases). This Court recently has granted certiorari in a case presenting this conflict. *Budinich* v. *Becton Dickinson & Co.*, cert. granted, No. 87-283 (Oct. 13, 1987). For reasons set out below, we do not believe it necessary to hold the present petition pending the decision in *Budinich*. See note 5, *infra*.

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In *Durham* v. *Kelly*, 810 F.2d 1500 (1987), the Ninth Circuit reached the same conclusion as did the Eleventh Circuit in *Lucas* and *Alimenta*. The Ninth Circuit held expressly that "a motion to alter or amend a judgment to award costs does not come within Rule 59(e)" and that Fed. R. App. P. 4(a)(4)'s provisions regarding the jurisdictional effects of Rule 59(e) motions therefore "are inapplicable with respect to a request for reconsideration concerning costs" (810 F.2d at 1503). In so holding, the Ninth Circuit pronounced itself "persuaded by the [Eleventh Circuit's] analysis in *Lucas* * * *" (*ibid.*).

2. The Fifth Circuit's decision in this case squarely conflicts with the decisions of the Ninth and Eleventh Circuits in *Lucas*, *Alimenta*, and *Durham*. The Fifth Circuit's decision also cannot be reconciled with this Court's decision in *White*, and is at odds with the treatment of costs under the Federal Rules of Civil Procedure.

a. Under *White*, as we note above, postjudgment applications for attorney's fees do not constitute Fed. R. Civ. P. 59(e) motions, at least where the entitlement to fees is not created by the underlying cause of action. *White*'s reasoning applies with equal force to cases where the prevailing party seeks costs rather than attorney's fees. A request for costs, no less than a request for attorneys' fees, "raises legal issues collateral to the main cause of action—issues to which Rule 59(e) was never intended to apply." *White*, 455 U.S. at 451 (footnote omitted). Costs under Rule 54(d) of the Federal Rules of Civil Procedure, like attorneys' fees under Section 1988, are allowed only to "prevailing parties." As a result, applications for costs, like applications for attorneys' fees, "will * * * require an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has 'prevailed.' " 455 U.S. at 451-452.[4] Moreover, costs under

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[4] The award of costs does not follow automatically from a judgment on the merits. Although Rule 54(d) entitles prevailing parties to

Rule 54(d) of the Federal Rules of Civil Procedure, like fees under Section 1988, "are not compensation for the injury giving rise to an action" (455 U.S. at 452). And a postjudgment application for costs, like a postjudgment motion for fees, " 'does not imply a change in the judgment, but merely seeks what is due because of the judgment' " (*ibid.* (quoting *Knighton,* 616 F.2d at 797)). In short, each of the considerations that led this Court to hold Section 1988 fee motions to be outside the scope of Fed. R. Civ. P. 59(e) in *White* applies with equal force to costs that are awarded under Fed. R. Civ. P. 54(d).[5]

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recover costs "unless the court otherwise directs," the district court's express authority to "otherwise direct[]" vests it with discretion over whether to award costs and what costs to award. See, *e.g., Delta Air Lines, Inc.* v. *August,* 450 U.S. 346, 352-356 (1981); *Farmer* v. *Arabian Am. Oil Co.,* 379 U.S. 227 (1964). Before this discretion even can be invoked, moreover, the district court may be called on to decide whether the party seeking costs is indeed a "prevailing party." As attorney's fee litigation under Section 1988 and other statutes has shown, the answer to "prevailing party" questions may be less than obvious. See generally *Harris* v. *McCarthy,* 790 F.2d 753, 759-760 (9th Cir. 1986); *Public Law Enforcement Inst.* v. *United States Dep't of Justice,* 744 F.2d 181, 183-184 (D.C. Cir. 1984); *Citizens Coalition for Block Grant Compliance, Inc.* v. *City of Euclid,* 717 F.2d 964, 966-967 (6th Cir. 1983).

[5] If costs were an integral part of the underlying cause of action, their proper status under Fed. R. Civ. P. 59(e) might well turn on this Court's forthcoming decision in *Budinich,* which will address the related question of how *White* applies to attorneys' fees that accrue as part of the underlying claim. See note 3, *supra.* In most cases, however, costs are awarded not by virtue of the underlying cause of action, but instead on the basis of the independent provisions of Fed. R. Civ. P. 54(d). In this case, the Death on the High Seas Act contains no provision regarding costs, which means that respondents' asserted right to costs necessarily is predicated on Rule 54(d) rather than on the Act. As a result, even if it is assumed that a postjudgment motion regarding costs constitutes a Fed. R. Civ. P. 59(e) motion when the entitlement to costs is part and parcel of the underlying claim (as when a contract provides for the award of costs as an element of damages in a contract action), this is not such a case. For that reason, we do not believe that this petition need be held pending the Court's decision in *Budinich.*

Indeed, two Terms after *White* was decided, this Court itself applied *White* to a postjudgment motion involving costs. In *FCC* v. *League of Women Voters,* 468 U.S. 364 (1984), the appellees contested the finality of a district court judgment on the ground that the district court had not disposed of a postjudgment motion concerning both costs and attorneys' fees (*id.* at 373-374 n.10). This Court, relying in part on *White,* held that the pendency of the postjudgment motion did not affect the Court's jurisdiction to consider the appeal pursuant to Rule 11.3 of the Rules of this Court, because the "issue of whether appellees were entitled to recover attorney's fees and costs" was "wholly collateral" to the judgment (*ibid.*). In so holding, the Court treated costs and fees identically for jurisdictional purposes.[6]

b. The case against treating postjudgment requests for costs as Fed. R. Civ. P. 59(e) motions is if anything stronger than the case against so treating postjudgment fee motions. The Federal Rules of Civil Procedure

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[6] The collateral nature of cost issues is further suggested by this Court's decision in *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974). In *Eisen,* a district court ordered the defendants in a securities class action to bear a portion of the costs of providing notice to class members. This Court ruled that the district court's order was immediately appealable under the "collateral order" doctrine of *Cohen* v. *Beneficial Indus. Loan Corp.,* 337 U.S. 541 (1949). The Court expressly held that the order assigning costs to the defendants "involved a collateral matter unrelated to the merits of [the plaintiff's] claims" (417 U.S. at 172). While the considerations that govern whether an order is "collateral" under the *Cohen* doctrine may not be identical to those governing whether an issue is collateral to the judgment for purposes of Fed. R. Civ. P. 59(e), *Eisen* nonetheless reflects a basic understanding that decisions regarding the allocation of costs are generally distinct from decisions regarding the merits of the litigation.

themselves draw a sharp distinction between the judgment on the merits and an award of costs. Fed. R. Civ. P. 54(d) provides that "[c]osts may be taxed by the clerk on one day's notice" and that, "[o]n motion served within 5 days thereafter, the action of the clerk may be reviewed by the court." Rule 54(d) thus contemplates that applications for costs will be presented in the first instance not to the district judge but to the clerk, and that the district judge will not take up the issue at all unless the losing party makes a timely motion for him to do so. See 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil* § 2679, at 396 (2d ed. 1983) (footnote omitted) ("[N]othing normally can come before the court until the clerk has acted and an objection has been made."); Comment, *Taxation of Costs in Federal Court—A Proposal*, 25 Am. U.L. Rev. 877, 881-883 (1976). In turn, Fed. R. Civ. P. 58 provides that "[e]ntry of the judgment shall not be delayed for the taxing of costs." Rule 58, like Rule 54(d), thus "attempts to divorce the process of entering judgment from that of determining and assessing the costs." C. Wright, A. Miller & M. Kane, *supra*, § 2679, at 392; see *Lucas*, 729 F.2d at 1300. In contrast, the Fifth Circuit's decision here treats a routine postjudgment application for costs not as a collateral proceeding following from the judgment, as contemplated by Rules 54(d) and 58, but as a request for modification of the judgment itself.

The Fifth Circuit adopted the jurisdictional rule applied in this case in large part because it believed that a "bright-line" rule would be beneficial to litigants and the courts. See *Harcon Barge*, 784 F.2d at 670. As a general matter, we have no quarrel with the view that bright-line rules are desirable to settle issues of jurisdiction. Indeed, where the Federal Rules of Civil Procedure and Appellate Procedure accommodate them, such principles serve important interests of predictability and judicial economy. But the Fifth Circuit's proposed rule, which—as *White* con-

firms—is not compelled by the language or purposes of Fed. R. Civ. P. 59(e), is not the only construction that provides certainty and predictability in this context. To the contrary, *White* points to an equally clear (if narrower) rule: postjudgment applications for costs predicated on Fed. R. Civ. P. 54(d) are simply not Rule 59(e) motions, regardless of how framed or when filed.[7]

Not only is the Fifth Circuit's rule unnecessary, it may create inequitable traps for the unwary. Under the decision below, whenever the losing party acts promptly to file a concededly valid notice of appeal, the prevailing party can force the losing party to file a second notice of appeal, simply by miscasting a routine motion for costs under Fed. R. Civ. P. 54(d) as a motion to alter or amend judgment under Fed. R. Civ. P. 59(e). It is one thing to require a losing party to comply with the strict letter of the rules in order to perfect its right to appeal. Cf. *Acosta* v. *Louisiana Dep't of Health & Human Resources*, No. 85-1500 (June 30, 1986). But it is quite another thing to require the losing party, on pain of forfeiting all right to appeal, to take reparative action because the *prevailing* party has failed to follow the letter of the rules. Such an approach will only encourage procedural irregularity and opportunistic behavior, not the "just, speedy, and inexpensive determination of every action" that the Rules are designed to secure. See Fed. R. Civ. P. 1.

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[7] In any event, the line drawn by the Fifth Circuit may well be less bright than the court below believed. Because the Fifth Circuit felt compelled by Fed. R. Civ. P. 60(a) to carve out an exception for motions filed within 10 days of judgment involving "clerical errors" (see *Harcon Barge*, 784 F.2d at 669-670) the court's rule invites litigation over whether a particular error or omission in a judgment is "clerical" or not. Indeed, inasmuch as Rule 54(d) entitles the prevailing party to costs "unless the court otherwise directs," another court of appeals plausibly might conclude that the omission of costs from the judgment in a case like this one is a clerical error and hence that a motion for costs like the present one should not constitute a Fed. R. Civ. P. 59(e) motion under the Fifth Circuit's general rule.

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3. Because the Fifth Circuit's decision is inconsistent both with this Court's precedents and with the Federal Rules of Civil Procedure, and because the decision creates a conflict among the courts of appeals, review by this Court may be appropriate. We have some doubt, however, that plenary review, as opposed to summary disposition, is warranted.

Of course, the federal judicial system has an interest in the uniform and proper interpretation and application of the Federal Rules of Civil Procedure and Appellate Procedure. As a practical matter, however, the existence of a circuit conflict over the present jurisdictional issue may not result in intolerable confusion or inconvenience for litigants. As long as each court of appeals takes a clear position on the status of postjudgment cost motions under Fed. R. Civ. P. 59(e), litigants may have adequate guidance on how they should proceed to protect their right of appeal in any given circuit. Given the clarity of this Court's reasoning in *White*, moreover, there is reason to doubt that the Fifth Circuit's error in this case will be made by other courts of appeals.[8] In light of the other demands on this Court's time, the issue in this case may not be sufficiently important to claim the Court's plenary attention. For the reasons given above, however, we believe that the correct outcome in this case is clear—sufficiently clear that the Court may find it appropriate to reverse the Fifth Circuit's decision summarily on the basis of *White*.

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[8] Respondents correctly note (Br. in Opp. 6) that in *Charles* v. *Daley*, 799 F.2d 343 (1986), the Seventh Circuit formally adopted the Fed. R. Civ. P. 59(e) standards set forth by the Fifth Circuit in *Harcon Barge*. See *Charles*, 799 F.2d at 347. *Charles* does not make clear, however, whether the Seventh Circuit will apply *Harcon Barge* as expansively as the Fifth Circuit has done in this case. Although *Charles* relied on *Harcon Barge* to classify a postjudgment motion regarding attorneys' fees as a Rule 59(e) motion, the movant in *Charles* was seeking not only to alter a prior fee order but to intervene for the first time as a party defendant as well. See 799 F.2d at 344-347. In this and other respects, the motion at issue in *Charles* was more closely tied to the merits of the judgment than would be a conventional postjudgment application for attorneys' fees or costs.

No other court of appeals decision has followed *Charles* in adopting *Harcon Barge*. The other decisions noted by respondents (Br. in Opp. 6) have cited *Harcon Barge* only for the general (and unexceptionable) proposition that timely postjudgment motions seeking reconsideration of the correctness of the judgment come within the scope of Rule 59(e). See, *e.g.*, *Skagerberg* v. *Oklahoma*, 797 F.2d 881, 883 (10th Cir. 1986) (citing *Harcon Barge* for proposition that "a [timely] postjudgment motion * * * that questions the correctness of a judgment is properly construed as a [Rule 59(e)] motion to alter or amend judgment").

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the court of appeals summarily reversed.

Respectfully submitted.

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DECEMBER 1987

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